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OCT 27 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-436

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

DONALD REGAN, Secretary of the Treasury, *et al.*,
Petitioners,

v.

RUTH WALD, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Treasury regulations of April, 1982 restricting travel to Cuba, 31 C.F.R. 515.560, were invalid because the petitioners failed to comply with the procedures of the 1977 International Emergency Economic Powers Act (IEEPA), 50 U.S.C. (Supp.V) §§ 1701-1706.

2. Whether the regulations were invalid despite a savings clause, providing that the "authorities . . . being exercised" with respect to a country on July 1, 1977 under § 5(b) of the Trading with the Enemy Act (TWEA) may continue to be exercised with respect to that country, Pub.L. No. 95-223, §101(b), 91 Stat. 1625, 50 U.S.C. App.5 note (1977), in view of the fact that on July

1, 1977 the executive branch was not exercising the power to prohibit the travel of American citizens to Cuba.

3. Whether the 1978 Amendment to the Passport Act, 22 U.S.C. § 211(a), prohibits the executive branch from imposing area restrictions upon the travel of American citizens in the absence of war, hostilities or danger to their safety.

4. Whether the Trading with the Enemy Act was ever intended to prohibit, upon pain of criminal sanctions, the peacetime travel of American citizens.

5. Whether the Treasury's 1982 prohibition of travel to Cuba based upon the 1950 Korean War declaration of emergency violated the constitutional rights of American citizens under the

First and Fifth Amendments to travel to Cuba for the purpose of meeting with Cuban citizens and of observing conditions in that country.

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STATUTES AND REGULATIONS INVOLVED

The relevant statutes and regulations, in addition to those set forth by petitioners, are the International Emergency Economic Powers Act, 50 U.S.C.

(Supp. V) §§ 1701-1706 (IEEPA); and the Passport Act of 1926, 22 U.S.C. § 211(a), as amended by the 1978 Foreign Relations Authorization Act § 124; Pub.L. 95-426, §124, 92 Stat. 971, both reproduced in Appendix A infra, 1a to 7a.

STATEMENT

1. On March 9, 1977, President Carter announced the removal of all restrictions on the travel of American citizens to Cuba.[1/] This announcement was immediately implemented by the State Department[2/] and followed by the

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1/ President's News Conference of March 9, 1977, 13 Weekly Comp. of Pres. Doc. 328-29 (Mar. 14, 1977).

2/ By regulation, area restrictions on travel to designated countries were issued periodically by the Secretary of State in the Federal Register, 22 CFR Part 51 (1974-77). The last such notice to appear for Cuba appears at 41 Fed.
(footnote continued)

Treasury Department.[3] The Executive took these actions in accordance with President Carter's campaign pledge to comply with the Final Act of the Conference on Security and Cooperation in Europe (1975)[4] (hereinafter "Helsinki")

(footnote continued from previous page) Reg. 41105 (Sept. 21, 1976). On March 18, 1977, the State Department's passport restrictions expired. See C.A. Appendix of Legislative History, Item A, at 15, n.7. The Treasury Department's regulations were removed as a matter of course on March 21, 1977, since those regulations were dependent on the State Department's prohibition. Thus, President Carter's instruction to the Secretary of State to "remove any travel restrictions on American citizens who want to go to . . . Cuba," President's News Conference of March 9, 1977, 13 Weekly Comp. of Pres. Doc. 328-29 (Mar. 14, 1977), led to the removal of all impediments to such travel.

[3] 42 Fed. Reg. 16621 (March 29, 1977) (declaring that transactions incident to travel are not barred).

[4] President's News Conference of March 9, 1977, 13 Weekly Comp. of Pres. Doc. 328-329 (Mar. 14, 1977).

which called for greater understanding among nations through freedom of international movement and communication.5/

Reciting the same reasons, Congress in 1978 amended the Passport Act of 1926 to enact into law President Carter's determination to remove all travel restrictions. Pub.L. 95-426, § 124, 92 Stat. 971, 22 U.S.C. § 211(a) (1978) (hereinafter "Section 211(a)"). This 1978 amendment limited the government's power to restrict travel by passport control, the customary method used for that purpose, and authorized area restrictions in only three instances: war, actual hostilities in the area, and physical

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5/ See Dep't State Bull., Sept. 1, 1975, at 323.

danger to American citizens.[6] The government concedes that none of these circumstances is applicable here. Although the Executive Branch had already changed the prior restrictive policy to conform to Helsinki principles, Congress in 1978 amended 22 U.S.C. § 211(a) because "the freedom-of-travel principle is sufficiently important that it should be a matter of law and not dependent upon a particular Administration's policy." S. Rep. No. 95-842, 95th Cong., 2d Sess. 14 (1978).

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[6] S.Rep. No. 95-842, 95th Cong., 2d Sess. 14-15 (1978). The Senate Report notes that the amendment restricts the President's authority to limit use of passports for the purpose of achieving greater compliance with the Helsinki Final Act, and to encourage other signatory countries to comply. Id.

In direct contravention of this congressional mandate, the Reagan administration, in April, 1982, promulgated new Treasury regulations restricting travel to Cuba. 47 Fed. Reg. 17030, now codified at 31 C.F.R. 515.560. The Executive attempted to avoid the mandate of Section 211(a) by relying on the Treasury Department's authority to regulate commerce and trade with foreign countries, pursuant to a statute originally enacted in 1917, the Trading with the Enemy Act (hereinafter "TWEA"), rather than on the State Department's traditional authority over passports. These new regulations, which prohibit "travel transactions" on pain of substantial criminal penalties[7/],

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7/ 50 U.S.C. App. § 16 makes a willful violation of any provision of the TWEA (footnote continued)

represented the first express attempt to use the TWEA to restrict the travel of Americans and only the second occasion in which Treasury, rather than State, was the instrument.[8/] The government

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(footnote continued from previous page) punishable by a $50,000 fine or imprisonment for ten years, or both.

The only method of travel control which the Executive had ever before attempted to enforce through criminal sanctions was the regulation of passports. In United States v. Laub, 385 U.S. 475, 485 (1967), this Court held that the statute relied on by the government to prosecute travel to Cuba did not in fact make such travel a crime, and noted that "the State Department had consistently taken the position that there was no statute which imposed or authorized" criminal sanctions upon violation of area restrictions (emphasis added).

[8/] In 1980, 63 years after TWEA's enactment, under the hydraulic pressure of the Iranian crisis, the government invoked IEEPA in an attempt to ban travel to Iran. Exec. Order No. 12211, 45 Fed. Reg. 26,685 (Apr. 21, 1980). Even then, there was no attempt to enforce the regulation despite the widely publicized (footnote continued)

originally construed its regulation to bar even hosted travel involving no payment to Cuba although it subsequently

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(footnote continued from previous page) travel to Iran undertaken by former Attorney General Ramsey Clark and numerous other individuals.

The government's assertion here that "[t]ravel-related property transactions ... have been covered by the provisions of the Cuban Assets Control Regulations since 1963" (Pet. 7) is belied not least by its position during and after United States v. Laub, supra. As this Court's unanimous opinion in Laub noted, more than 600 individuals were known to have violated area travel restrictions by 1967 (and, by the government's hypothesis, the Cuban Assets Control Regulations as well). Nevertheless, the prosecutions in Laub and its companion case were the only attempts to enforce the area restrictions on Cuba; there was no assertion of any alternative source of power under the TWEA to enforce the ban on travel to Cuba, and the State Department conceded that there was "no statute which imposed or authorized" criminal sanctions for travelling to Cuba in violation of the administration's strenuous strictures. Id. at 485 (emphasis added). See also Association of the Bar of the City of New York Report, Freedom to Travel, at 72 (1958) (concluding that TWEA not intended

(footnote continued)

changed that position.[9] The Executive purported to issue the 1982 regulations under the TWEA; however, that statute, as the Court of Appeals determined, could not have given the government the authority to promulgate the travel restrictions at issue here. In 1977, after long and careful study and in

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(footnote continued from previous page) to be used as a device for regulation of travel), cited in United States v. Laub, 385 U.S. 475, 486, n.20 (1967).

[9] The government initially advised persons inquiring that 31 C.F.R. 515.560 bars travel even if it is wholly gratuitous, and results in no financial transfers or advantage to Cuba. See C.A.J.A. 20,21 (Mayerson Affidavit); see also C.A.J.A. 28 (Treasury Department Statement). Only later, when respondents' counsel indicated to the district court the implication of this broad claim of "economic" power did the government announce in open court a sudden change of position, under which it would not prosecute such hosted travel, while not disclaiming authority to do so. This position was later confirmed by regulation, 47 Fed.Reg. 32060 (July 23, 1982), codified at 31 C.F.R. 515.560(j).

response to widespread congressional judgment that the executive had substantially abused the emergency power originally granted it in 1917, Congress largely limited TWEA to wartime situations by passing the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. (Supp. V) §§ 1701, et seq. (App. A, infra, p.2a). That Act, as the government correctly notes, "established a new statutory framework for the President's exercise of economic powers during periods of national emergency" (Pet. 4). IEEPA was to govern all future peacetime uses of emergency power; the powers formerly exercised by the President were preserved during peacetime, in petitioners' words, only "to continue an existing embargo" (Pet. 5), i.e., one existing on July 1,

1977.[10]/ It is undisputed that there was no prohibition of or "existing embargo" on travel to Cuba on July 1, 1977, any such restrictions having been publicly removed four months earlier by President Carter.

2. The respondents are American citizens who seek to travel to Cuba and not-for-profit organizations engaged in educational research on Cuba. They include a lawyer, religious leaders and university professors, whose purpose was neither business nor holidays, but rather to learn about Cuba, its people and culture, in some cases to renew acquaintances made during prior visits, and to establish political contact with the

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[10]/ See 50 U.S.C. App. 5 note.

Cuban people.[11] They initiated this suit because the Treasury on April 20, 1982 made such travel impossible by the promulgation of 31 C.F.R. 515.560.

Without accepting his reasoning, the district court followed the recommendation of a magistrate to deny plaintiffs' application for a preliminary injunction (Pet. 22a-23a). The district court observed that plaintiffs had raised "fundamental constitutional issues that might well be proven at trial to be meritorious" (Pet. 22a-23a), although it determined that they had not shown the "substantial likelihood of success on the merits" necessary for a preliminary injunction.

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[11] C.A.J.A. 5-8 (Complaint).

A unanimous Court of Appeals reversed and ordered the district court to issue the preliminary injunction. The appellate court subsequently denied the government's petition for rehearing (Supplemental Opinion, Pet. 15a-19a), and its suggestion for rehearing en banc without dissent.

In two opinions written by Judge Breyer, the Court of Appeals held that the Cuban travel regulations lacked statutory authority because the Treasury had failed to "follow the 'consultative' procedures mandated" by IEEPA -- "procedures aimed at focusing the attention of Congress as well as the President on the need for the restrictions of the sort at issue here" (Pet. 2a). It further held that the savings clause allowing continuation of existing

restrictions did not authorize the regulations because it preserved only those prohibitions in existence on July 1, 1977. Accordingly, the Court of Appeals held that the regulations were invalid.

The unanimous opinions of the Court of Appeals are a model of legislative analysis based on a careful review of the statutory language, its extensive legislative history and an obedience to this Court's rules of statutory construction.12/

12/ The only other court of appeals which has considered the issue unanimously agreed that the position the government advances here was not supported by the legislative history and purpose of TWEA's grandfather clause and by its function within the broader statutory scheme. United States v. Frade, 709 F.2d 1387, 1398-99 (11th Cir. 1983).

The Court of Appeals found that on July 1, 1977 "the government was not restricting travel to Cuba" (Pet. 4a; emphasis in original), since on March 29, 1977 the government had removed any existing restrictions on Cuban travel. Because no travel controls were being "exercised" on that critical date, the court determined that the grandfather or savings clause did not permit their reinstatement without the procedural safeguards of IEEPA.

The court rejected the government's contention that the words "authorities being exercised" had such broad meaning that if any TWEA authority was being exercised the savings clause gave the government "the power to exercise every TWEA authority or at least every authority of the same broad type" (Pet.

5a). Noting that "this is not what the clause says" (Pet. 5a; emphasis in original), the Court of Appeals also looked to the legislative history and related administrative practices, and found no support there for the government's position.

The court also determined that "the legislative history makes clear that Congress intended the savings clause to be narrowly interpreted" (Pet. 7a). As the court pointed out, earlier drafts of the bill had included language that "might have allowed a broader reading of the 'savings clause,' thereby preserving TWEA powers that were not then exercised" (Pet. 9a).[13/] Congressman Bingham, the

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13/ The initial draft of the savings clause contained the following language: "any other authority conferred upon the President by [Section 5(b)] may be (footnote continued)

sponsor of the legislation, rejected that language in favor of the narrower language which ultimately became the grandfather clause in TWEA.

The court supported its conclusion by far more than "ordinary principles of statutory construction" (Pet. 11a). In addition to a thorough analysis of the legislative history of IEEPA and the TWEA amendments, the Court of Appeals relied on this Court's recognition in Aptheker v. Secretary of State, 378 U.S. 500, 517 (1964), that travel is a "'constitutional right closely related to' those activities that the Bill of Rights protects

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(footnote continued from previous page) exercised to deal with the same set of circumstances. . . ." Amendments to the Trading With The Enemy Act: Subcommittee Working Draft of June 8, 1977, 95th Cong., 1st Sess. § 101(b) (emphasis added) (attached as Appendix B). See Pet. 9a.

from infringement by Congress" (Pet. 11a). Thus, the Court of Appeals was bound to "'construe narrowly all delegated powers that curtail or dilute' the right to travel." Kent v. Dulles, 357 U.S. 116, 129 (1958) (Pet. 12a).

Finally, the court concluded that this case fell under the third of Justice Jackson's famous categories in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) -- the area in which Congress had taken measures inconsistent with the President's claim to power. The enactments in 1977 of IEEPA and in 1978 of the amendment to 22 U.S.C. § 211(a) are only two examples of statutes limiting presidential powers on which the Court of Appeals relied. See also War Powers Resolution, Pub.L. 93-148, 87 Stat. 555 (1973), codified as amended at

50 U.S.C. §§ 1541-1548; National Emergencies Act, Pub.L. No. 94-412, 90 Stat. 1255 (1976), codified as amended at 50 U.S.C. §§ 1601-1651 (Pet. 13a).

Reasons For Denying The Petition

First, the decision of the court below is indisputably correct and is now supported by the unanimous decision of the Court of Appeals for the Eleventh Circuit in United States v. Frade, 709 F.2d 1387 (11th Cir. 1983), petition for rehearing denied (September 23, 1983), which adopted the reasoning of the First Circuit in the instant case. (See Point I, infra, p.22).

Second, petitioners are not challenging the court below so much as they are the mandate of Congress in IEEPA. All of their arguments are directed at IEEPA as a whole, not merely

to its application to post-1977 regulations concerning Cuba. Unless this Court is prepared to pronounce on IEEPA's conformance to separation of powers principles - a subject not raised below - review of the order below would needlessly and prematurely inject the Court into a dispute between Congress and the Executive. It is significant that petitioners have failed to cite, much less to distinguish, this Court's most celebrated decision requiring the Executive to comply with the law enacted by Congress even when foreign affairs are concerned. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (See Point II, infra, p.34).

Third, petitioners pose a series of imaginary dangers that would follow from compliance with IEEPA and argue that the

decision below must be reversed to afford the executive the needed "flexibility" in implementing foreign policy. These dangers are exaggerated and speculative, however, and more importantly, are avoided by the use of IEEPA, in which Congress gave the President the greatest flexibility it believed possible, consistent with a constitutional structure of government which entrusted the law-making power to the Legislature, not the Executive. (See Point III, infra, p.38).

The granting of a petition for certiorari is, of course, a discretionary act of this Court. Such discretion should not be exercised here where two courts have reached the same conclusion upon the basis of accepted rules of construction and this Court would be re-

quired to address additional, sensitive statutory and constitutional problems. (See Point IV, infra, p.42)

I

The lower court's compelling construction of the statutory language is the only construction which is logical and consistent with the legislative history and other indications of congressional intent.

Statutory Language.

The court relied first upon the language of the statute, which permits the executive to avoid IEEPA's remedial measures by continuing only those prohibitions and restrictions "being exercised" on July 1, 1977. We agree with petitioners' formulation that the savings clause was intended to allow the

President "to continue under the old statutory scheme the embargoes that were in effect at the time the new legislation was being considered" (Pet. 5). The flaw in petitioners' argument is that travel, unlike trade, was not embargoed on July 1, 1977.

In contrast to the Court of Appeals' precise construction, the government offers several contradictory interpretations of the savings clause:

(a) First, the government contends that "the authorities 'being exercised' with respect to Cuba on July 1, 1977, plainly encompassed the authority to impose restrictions on travel-related transactions" (Pet. 15-16). The government misses the point of TWEA's grandfather clause. The test under the savings clause is whether the authority

was "being exercised" on that date, not whether it "encompasses" another authority which is not being exercised.

(b) Second, the government argues that although 31 C.F.R. § 515.560 did not restrict travel on July 1, 1977, it was an exception to the general prohibition of all transactions with Cuba contained in 31 C.F.R. 515.201. Rejecting the government's interpretation, the Court of Appeals correctly determined that this argument was invalid because the court "assumed that substance (i.e., was travel in fact being regulated?) rather than form, controlled." (Pet. 16a, emphasis in original). If petitioners' argument were correct, IEEPA would be permanently inapplicable to any country as to which any § 5(b) emergency powers were being exercised at the time of its enactment.

This interpretation, which encompasses far more countries than Cuba, is plainly contradicted by both the language and legislative history of IEEPA and the TWEA savings clause.

(c) Third, the government contends that the 1977 promulgation of 31 C.F.R. 515.560, authorizing travel to Cuba, was itself an exercise of embargo power and was sufficient to trigger application of the grandfather clause (Pet. 16, 17). This construction is contrary to the language and explicit purpose of the savings clause -- not to preserve existing sources of power but to continue existing prohibitions.

(d) The government argued to the court below that the mere existence of a national emergency proclamation authorizes the President to impose any and all

5(b) restrictions (Pet. 16a). It is unclear whether the government has abandoned this interpretation, which is plainly without merit and at odds with the purpose of IEEPA to subject executive exercises of emergency powers to congressional control.

Legislative History.

The Court of Appeals' full discussion of legislative history needs no repetition here (Pet. 7a-10a). Petitioners' selected references (Pet. 20-25) are at best ambiguous, as the court below noted in its supplementary opinion (Pet. 17a), and certainly not comparable to the extensive references relied upon by the court (Pet. 7a-10a). Petitioners' use of the terms "embargoes" and "existing embargoes" (Pet. 23-24) omits the critical term of reference: whether

travel was embargoed on July 1, 1977. The government's approach renders the term "existing uses" mere surplusage. If Congress intended to grandfather countries or existing states of emergency it would not have rejected the language which clearly and simply accomplished that purpose. Supra, p.16 & n.13, infra, App. B., p.6a. The Eleventh Circuit agreed that this legislative history supports and compels the conclusion of the court below. United States v. Frade, 709 F.2d at 1397-1402.

None of the ambiguous statements the government picks out of the legislative history supports its premise that travel actually was controlled or embargoed on July 1, 1977 (Pet. 17 n.29; 23). When Congressman Bingham, the primary sponsor of the legislation, referred to

"embargoes," id, he was not referring to an embargo upon travel, but to "trade embargoes and assets control programs currently applied by the United States" (Pet. 23 n.36)(emphasis supplied).

Legislative Purpose.

Petitioners are strangely silent on the central issue in the case: the purpose behind enactment of IEEPA and the reason Congress added the savings clause. The opinions of the court below and of the Eleventh Circuit answer both questions: (1) IEEPA was passed because Congress was dissatisfied with the executive branch's broad use of emergency powers and sought to establish new procedures for peacetime emergencies; (2) the savings clause was added to avoid the need for a new presidential proclamation as a condition to continuing existing

prohibitions (Pet. 7a-10a). As the court below said: "the reason for the 'savings clause' -- the need to avoid this type of public act in order to continue ongoing restrictions -- simply bears no relation to this case" (Pet. 11a, emphasis in original).14/

Administrative Practice.

Petitioners' claim that the court's construction of the savings clause "disaggregates" the authorities being exercised on July 1, 1977 (Pet. 18), disregards not a page but a book of

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14/ Petitioners' assertion that the Foreign Assets Control program of July 1, 1977 has "continued to evolve since that date" (Pet. 20), even if true, would not resolve the question of Congress' purpose in enacting IEEPA and the grandfather clause. Petitioners' statement is misleading, however, since petitioners' citations disclose no substantive change in the regulations (See Pet. 20-21 n.33). In this respect the new travel restrictions challenged here are unique.

history. As the court below demonstrated, "administrative practice suggests that the government, historically speaking, has always considered travel restrictions different from other, more typical, TWEA rules and regulations" (Pet. 5a). It noted that "documents submitted to this Court indicate that Treasury still treats travel restrictions as different from other restrictions" (Pet. 6a; see also Pet. 16a). Of course, not only did the Executive Branch itself "disaggregate" when, in March 1977 it authorized travel to Cuba and in 1982 sought to impose restrictions, but, in addition, our country has persistently argued that the currency controls through which Soviet bloc countries restrict

travel violate the Helsinki agreement and are different in kind from ordinary trade and commercial restrictions.15/

Principles of Statutory Construction.

The decision below was made in accordance with four principles of statutory construction, repeatedly relied on by this Court: (1) remedial statutes, such as IEEPA, are to be broadly

15/ See, e.g., Commission on Security and Cooperation in Europe, Implementation of the Final Act of the Conference on Security and Cooperation in Europe: Findings and Recommendations Two Years After Helsinki, Report Transmitted to the House Committee on International Relations, 95th Cong., 1st Sess. 91 (Sept. 23, 1977)("obstacles to travel by Soviet citizens in the West include ... the small [90 rubles] currency allowance"). Id. at 98 (similar Czechoslovakian restrictions); id. at 104 (Hungary); id. at 109 (Poland)("one considerable restriction is that of foreign exchange").

construed;[16] (2) savings or grandfather clauses, in contrast, require narrow construction;[17] (3) criminal statutes require narrow construction;[18] (4) as do other statutes affecting basic liberties.[19]

16/ E.g., Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392 (1959); Spokane & Inland Empire R.R. Co. v. United States, 241 U.S. 344, 350 (1915).

17/ Id.

18/ E.g., United States v. Laub, 385 U.S. 475, 480 (1967); United States v. Boston & Maine R.R., 380 U.S. 157, 160 (1965); Commissioner v. Acker, 361 U.S. 87, 91 (1959); Smith v. United States, 360 U.S. 1, 9 (1959); F.C.C. v. American Broadcasting Co., 347 U.S. 284, 296 (1954).

19/ E.g., N.L.R.B. v. Catholic Bishop of Chicago, 440 U.S. 490, 504-507 (1979); Kent v. Dulles, 357 U.S. 116, 129 (1958).

Related Statutes.

Finally, the decision below is consistent with several other congressional statutes: the 1978 Amendment to the Passport Act of 1926; the War Powers Resolution, Pub.L. 93-148, 87 Stat. 555 (1973); and the National Emergencies Act, Pub.L. No. 94-412, 90 Stat. 1255 (1976). The court was correct in looking at these contemporaneously enacted statutes "for the light they cast on the historical context of the statute at issue" (Pet. 12a), citing Dames & Moore v. Regan, 453 U.S. 654, 678 (1981), since they too were intended to restrict the President's power to involve the United States in foreign adventures and to protect the rights of United States citizens.

II

Petitioners express concern over the alleged impact of the decision below upon the President's flexibility in carrying out foreign policy. The criticism is inaccurate and misplaced: inaccurate because IEEPA, regrettably in our view, gives the Executive very substantial flexibility; misplaced, because it was for Congress to determine the degree of flexibility to be given. The court below properly disposed of the government's complaint by relying on Justice Jackson's statement in Youngstown Sheet & Tube Co. v. Sawyer, that in cases like this "courts can sustain exclusive presidential control . . . only by

disabling the Congress from acting upon the subject." 343 U.S. at 636-37 (Pet. 12a).20/

Petitioners defend the regulation on the ground that educational travel will some day make "hard currency" available to Cuba. This "hard currency" argument is pure fiction. The very regulation challenged here authorizes the travel of Cuban-Americans visiting relatives in Cuba, which produces far more hard currency to Cuba than the travel of other American citizens, such as respond-

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20/ Petitioners' quotation from MacKenzie v. Hare, 239 U.S. 299, 311 (1915) (Pet. 21) is not only inapposite but ironic. When this Court held that it "should hesitate long before limiting or embarrassing such powers," it was upholding a denationalization act of Congress. In the present case it is respondents who rely upon a congressional enactment which the Executive seeks to circumvent.

ents;[21] and the amount of trade permitted to Latin-American affiliates of American corporations gives even greater economic benefit to Cuba.[22] If "hard currency" were actually the reason to reinstitute travel controls, the President has available to him the elimination of these and other economic advantages to Cuba.

Nor is petitioners' fear that the use of IEEPA procedures "could have grave foreign policy implications" (Pet. 14) and "could needlessly heighten tensions and adversely affect United States

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[21] The government has estimated that 60 percent of the Americans travelling to Cuba are Cuban-Americans to whom the restrictions do not apply. See C.A.J.A. 19 (Mayerson Affidavit). See also C.A.J.A. 28 (Treasury Department Statement).

[22] See C.A.J.A. 22 (Mayerson Affidavit).

foreign policy interests" (Pet. 15), even if relevant, credible. Notwithstanding the Court's understandable reluctance to second guess the Executive on such questions, surely it need not disregard the far more serious tensions caused by the naval "maneuvers" around Nicaragua, the publicly-admitted United States military and CIA support for the overthrow of the Government of Nicaragua and the escalation of United States language with respect to Cuba and Nicaragua.23/ An IEEPA declaration is certainly de minimis

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23/ See, e.g., Sandinistas Under Siege, N.Y. Times, Oct. 17, 1983, § A at 1, Col. 3; U.S. Officials Say C.I.A. Helped Nicaraguan Rebels Plan Attacks, N.Y. Times, Oct. 16, 1983, § A at 1, Col. 4; America's Secret Warriors: The CIA Reborn, Newsweek, Oct. 10, 1983, at 38.

compared to this public provocation.[24]

III

The granting of the petition for certiorari would require the Court to decide several statutory and constitutional questions raised by the respondents in both courts below.

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[24] Of course, assuming arguendo that IEEPA (and TWEA) were intended to reach travel, an IEEPA declaration is not the only alternative available to the Executive. If the Executive wanted to proscribe travel to Cuba without making such a declaration, it could seek legislation so authorizing. See I.N.S. v. Chadha, 51 U.S.L.W. 4907 (June 21, 1983).

It is significant that the argument which the Executive is making to influence the Court in this case -- that the mere invocation of IEEPA might have disastrous implications for our foreign policy -- is precisely the argument with which it attempted to frighten Congress recently with respect to Lebanon and the invocation of the War Powers Resolution.

The first issue the Court would have to reach is whether the 1978 amendment to the Passport Act prevents the executive as a whole from imposing area restrictions. The 1978 Amendment refers to passports because passport restrictions were the manner in which travel or area restrictions were traditionally imposed. See Haig v. Agee, 453 U.S. 280 (1981); United States v. Laub, 385 U.S. 475 (1967); Zemel v. Rusk, 381 U.S. 1 (1965). Its legislative history, however, makes clear that Congress intended to address and limit the Executive's power to impose area controls in any form.[25] Congress

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[25] The amendment to § 211(a) originated in the Senate. See S. Rep. No. 95-842, 95th Cong., 2d Sess. 14 (1978). There was no comparable provision in the House, and the amendment was added to the House bill in conference. See H.R. Conf. Rep. No. 95-1535, 95th Cong., 2d Sess. 45, reprinted in 1978 U.S. Code Cong. and Ad. (footnote continued)

was concerned not with the State Department and its passport function, but rather with "the freedom of travel principle." S. Rep. No. 95-842, supra. The government's claim that the regulation challenged here does not implicate the concerns of section 211(a) renders that statute a meaningless gesture. As this Court has said: "[S]ophisticated as well as simple-minded" attempts to evade limitations on governmental power are equally unlawful. Lane v. Wilson, 307 U.S. 268, 275 (1939). See also Sherbert v. Verner, 374 U.S. 398 (1963); Speiser v. Randall, 357 U.S. 513 (1958).

A second issue requiring decision (should petitioners prevail on the savings clause point) is whether TWEA

(footnote continued from previous page) News 2478, 2486. It was not debated on the floor of either chamber.

ever authorized restrictions on the constitutional right to travel. In the 66 years since its passage, TWEA has never been enforced against the thousands of persons who have openly travelled to nations subject to general embargoes. When Congress intended to limit travel or even to deter it, it enacted legislation directed explicitly to this issue. See, e.g., 40 Stat. 559, Chapter 81 (1918 statute described by this Court as "the first travel control statute," Haig v. Agee, 453 U.S. 280, 296, (1981)). See also H.R. Rep. No. 485, 65th Cong., 2d Sess. 2-3 (1918)(concluding that TWEA leaves American citizens free to come and go); Association of the Bar of the City of New York, Freedom to Travel at 70. (1958) (concluding that there is no statute which provides a penalty for

violations of area restrictions), cited in United States v. Laub, 385 U.S. at 486, n.20. Even to the extent that the Treasury has claimed that the general Cuban embargo restricts travel transactions--an issue which was not resolved below and on which the parties are in serious disagreement --it is clear, as the court below found, that the Treasury merely followed and attempted to implement the primary State Department policy upheld in Zemel v. Rusk, supra, and took no independent role.

IV

Finally, this Court would be required to address the constitutionality of the executive branch's attempt to restrict the peacetime travel of American citi-

zens. The right to travel was reaffirmed by this Court in Kent v. Dulles, 357 U.S. 116 (1958); United States v. Laub, 385 U.S. 475 (1967); and Aptheker v. Secretary of State, 378 U.S. 500 (1964). It was recognized in Haig v. Agee, supra, where the Court upheld the revocation of a passport based upon Agee's refusal to challenge the government's charge that his travel endangered security and foreign relations, and where the government claimed that Agee's travel might result in the assassination of CIA operatives abroad, a far cry from the amorphous economic interests here balanced against the liberty of movement. In Zemel v. Rusk, the Court was careful to indicate the limitations of its holding, namely, that the Secretary of State could not be compelled to validate

a passport for travel to Cuba. The Court did not decide whether the government could lawfully prohibit such travel through criminal sanctions, and indeed, later decided that it could not in United States v. Laub, supra.

CONCLUSION

The petition for a writ of certiorari should be denied.

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Dated: October 21, 1983.

APPENDIX A

STATUTES INVOLVED

The 1978 Foreign Relations Authorization Act §124; Pub. L.95-426, §124, 92 Stat. 971, now codified at 22 U.S.C. §211(a), provides:

Limitation on Geographical Travel Restrictions in United States Passports

> **Sec. 124.** For the purpose of achieving greater United States compliance with the provisions of the Final Act of the Conference on Security and Cooperation in Europe (signed at Helsinki on August 1, 1975) and for the purpose of encouraging other countries which are signatories to the Final Act to comply with those provisions, the first section of the Act entitled "An Act to regulate the issue and validity of passports and for other purposes", approved July 3, 1926 (22 U.S.C. 211a), is amended by adding at the end thereof the following: "Unless authorized by law, a passport may not be designated as restricted for travel to or for use in any country other than a country with which the United States is at war, where armed hostilities are in progress, or where there is imminent danger to the pub-

lic health or the physical safety of United States travellers.

The International Emergency Economic Powers Act, 50 U.S.C. (Supp. V) §§1701-1706, provides in relevant part:

TITLE II--INTERNATIONAL EMERGENCY ECONOMIC POWERS

. . .

Situations In Which Authorities May Be Exercised

Sec. 202. (a) Any authority granted to the President by section 203 may be exercised to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat.

(b) The authorities granted to the President by section 203 may only be exercised to deal with an unusual and extraordinary threat with respect to which a national emergency has been declared for purposes of this title and may not be exercised for any other purpose. Any exercise of such authorities to deal with any

new threat shall be based on a new declaration of national emergency which must be with respect to such threat.

Grant of Authorities

Sec. 203. (a)(1) At the times and to the extent specified in section 202, the President may, under such regulations as he may prescribe, by means of instructions, licenses, or otherwise--

(A) investigate, regulate, or prohibit--

(i) any transactions in foreign exchange,

(ii) transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or a national thereof.

(iii) the importing or exporting of currency or securities; and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions

involving, any property in which any foreign country or a national thereof has any interest; by any person, or with respect to any property, subject to the jurisdiction of the United States.

* * *

Consultation and Reports

Sec. 204. (a) The President, in every possible instance, shall consult with the Congress before exercising any of the authorities granted by this title and shall consult regularly with the Congress so long as such authorities are exercised.

(b) Whenever the President exercises any of the authorities granted by this title, he shall immediately transmit to the Congress a report specifying--

(1) the circumstances which necessitate such exercise of authority;

(2) why the President believes those circumstances constitute an unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States;

(3) the authorities to be exercised and the actions to be taken in the exercise of those authorities to deal with those circumstances;

(4) why the President believes such actions are necessary to deal with those circumstances; and

(5) any foreign countries with respect to which such actions are to be taken and why such actions are to be taken with respect to those countries.

(c) At least once during each succeeding six-month period after transmitting a report pursuant to subsection (b) with respect to an exercise of authorities under this title, the President shall report to the Congress with respect to the actions taken, since the last such report, in the exercise of such authorities, and with respect to any changes which have occurred concerning any information previously furnished pursuant to paragraphs (1) through (5) of subsection (b).

* * *

APPENDIX B

REJECTED DRAFT OF TWEA'S SAVINGS CLAUSE

The subcommittee working draft of the rejected language of the Amendment to TWEA read, in relevant part, as follows:

TITLE I--AMENDMENTS TO THE TRADING WITH THE ENEMY ACT

Removal of National Emergency Powers Under The Trading With The Enemy Act

Sec. 101. (a) Section 5(b)(1) of the Trading with the Enemy Act is amended by striking out "or during any other period of national emergency declared by the President" in the text preceding subparagraph (A).

(b) Notwithstanding the amendment made by subsection (a)--

(1) any authority conferred upon the President by section 5(b) of the Trading with the Enemy Act, which is being exercised with respect to a set of circumstances on the date of enactment of this Act as a result of a national emergency declared by the President before such date of enactment, may continue to be exercised with respect to such set of circumstances; and

(2) any other authority conferred upon the President by that section may be exercised to deal with the same set of circumstances;

subject to the termination provisions of title I of the National Emergencies Act.

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